

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD BROWN,

Defendant-Appellant.

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UNPUBLISHED

June 22, 2004

No. 247711

Wayne Circuit Court

LC No. 02-010597

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant James Edward Brown appeals as of right his bench trial convictions of two counts of felonious assault,<sup>1</sup> felon in possession of a firearm,<sup>2</sup> and possession of a firearm during the commission of a felony.<sup>3</sup> Defendant was sentenced to four years' imprisonment for each felonious assault conviction; fifteen months to five years' imprisonment for his felon in possession of a firearm conviction; and two years' imprisonment for his felony-firearm conviction.<sup>4</sup> We affirm.

**I. Facts and Procedural History**

The circumstances surrounding defendant's convictions arose from defendant's assault of Rufus Williams and Christopher Bell following a dispute between neighbors. On May 23, 2002, an argument arose between defendant's sisters and the family of Mr. Williams's girlfriend, Kenisha Lance, in which Mr. Williams intervened. Later in the day, Mr. Williams and Mr. Bell sat in a car in Ms. Lance's driveway listening to music. Defendant drove up with two other men and approached the vehicle looking for "Capone," referring to Mr. Williams. Defendant reached

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<sup>1</sup> MCL 750.82. Defendant was originally charged with five counts of assault with intent to murder, MCL 750.83. Defendant was acquitted of three of these charges and convicted of two counts of the lesser included offense of felonious assault.

<sup>2</sup> MCL 750.224f.

<sup>3</sup> MCL 750.227b.

<sup>4</sup> Although defendant was sentenced as an habitual offender, his sentence was not enhanced.

into the passenger window and hit Mr. Williams in the chest.<sup>5</sup> While standing two feet from the passenger door, defendant shot twice at the vehicle and then walked to the driver's side. Defendant continued to shoot while Mr. Williams and Mr. Bell ran from the vehicle. A bullet grazed Mr. Williams's neck and Mr. Bell was hit in the shoulder. Three women sitting on Ms. Lance's porch were also forced to run for cover.

Before defendant's trial, the trial court ordered the prosecution, upon defendant's motion, to "provide copies of any and all criminal histories of the civilian witnesses at least two weeks prior to trial."<sup>6</sup> On the first day of trial, defense counsel objected to the prosecution's failure to comply with this order.<sup>7</sup> The prosecution indicated for the record that neither witness to be called that day had any relevant criminal history.<sup>8</sup> The prosecution argued that it was not required to provide such discovery, but was unprepared to argue its position. The trial court held the production of the criminal histories of the remaining three prosecution witnesses under advisement until the prosecution provided the relevant case law.<sup>9</sup> On the second day of trial, however, the prosecution presented its witnesses without objection from defendant or comment by the trial court.

## II. Sufficiency of the Evidence

Defendant alleges that the evidence was insufficient to support his convictions for two counts of felonious assault. Specifically, defendant contends that he was not the shooter. In sufficiency of the evidence claims, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>10</sup> "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."<sup>11</sup>

Felonious assault requires proof of "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery."<sup>12</sup> The defendant must have the "present ability or apparent present ability to commit a battery."<sup>13</sup> The only defense witness testified that another man situated at the rear of the vehicle

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<sup>5</sup> Witnesses presented conflicting testimony regarding whether defendant hit Mr. Williams with his firearm or his fist.

<sup>6</sup> [Order to Produce Criminal Histories, October 10, 2002.]

<sup>7</sup> [Waiver Trial Transcript, February 3, 2003, p 5.]

<sup>8</sup> [Waiver Trial Transcript, February 3, 2003, pp 6-7.]

<sup>9</sup> [Waiver Trial Transcript, February 3, 2003, p 11.]

<sup>10</sup> *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

<sup>11</sup> *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

<sup>12</sup> *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

<sup>13</sup> *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

was in fact the shooter. However, multiple prosecution witnesses identified defendant as the assailant, and testimony regarding the location of the bullet holes on the vehicle indicate that the shooter was on the passenger side. We will not interfere with the trial court's determination regarding witness credibility.<sup>14</sup> As the testimony reveals that defendant shot at Mr. Williams and Mr. Bell at close range causing them to run for their lives, sufficient evidence was presented to support defendant's convictions for felonious assault.

### III. Discovery of Criminal Histories

Defendant contends that the trial court violated his Sixth Amendment right to confront the witnesses against him by failing to enforce its order requiring the prosecution to produce records of the criminal histories of the complaining witnesses. The prosecution contends that it was not required to do so pursuant to *People v Elkhoja*.<sup>15</sup>

Evidence of prior convictions for offenses containing an element of dishonesty, false statement or theft are admissible for impeachment purposes.<sup>16</sup> The evidence must be elicited from the witness or established by public record during cross-examination.<sup>17</sup> However, defendants do not have access to the criminal records of civilian witnesses and so must seek this information from the prosecution through discovery.

A defendant has a due process right to discovery of "evidence favorable to an accused," including impeachment evidence.<sup>18</sup> Michigan requires reciprocal discovery in criminal cases,<sup>19</sup> as well as requiring the prosecution to provide a defendant, upon request, certain information known to the prosecution.<sup>20</sup> Even if not required by court rule, "[d]iscovery will be ordered in

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<sup>14</sup> *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

<sup>15</sup> *People v Elkhoja*, 251 Mich App 417; 651 NW2d 408 (2002), vacated in part 467 Mich 916 (2003) (*Elkhoja I*).

<sup>16</sup> MRE 609(a).

<sup>17</sup> *Id.*

<sup>18</sup> *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

<sup>19</sup> MCR 6.201(A) (mandatory reciprocal disclosures). The court rule took effect in 1995 following our Supreme Court's decision in *People v Lemcool*, 445 Mich 491; 518 NW2d 437 (1994).

<sup>20</sup> MCR 6.201(B). Specifically, the rule provides:

Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

(continued...)

criminal cases, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression.”<sup>21</sup> However, neither party is entitled to the discovery of information if its disclosure would violate a statute.<sup>22</sup>

In *Elkhoja*, this Court found that the prosecution is required to provide the defendant upon request with any exculpatory or impeachment information found within its witnesses’ computerized criminal histories found on the Michigan Law Enforcement Information Network (LEIN).<sup>23</sup> The rules promulgated to implement the LEIN statute<sup>24</sup> provide that LEIN information “shall only be disseminated to a criminal justice agency or an agency that is statutorily authorized to have access to such data” and shall not be sold or disseminated to any agency “not legally authorized to have access to this information.”<sup>25</sup> 1981 AACCS, R 28.5209 further provides that a user agency may release LEIN information to another agency “upon written request from a . . . prosecuting attorney who shall specify that the information required is for a valid criminal justice purpose” or upon a court order.<sup>26</sup> However, a user agency may not disseminate the information to a private person.<sup>27</sup>

Based upon these rules, this Court in *Elkhoja* and in *People v Mack*<sup>28</sup> found that the prohibition of dissemination of LEIN information to private individuals for personal reasons did not prevent the release of this information to a defendant for a valid criminal justice purpose pursuant to court order.<sup>29</sup> The *Elkhoja* dissent noted that the prosecution is not required to conduct discovery on behalf of a defendant.<sup>30</sup> The dissent further reasoned that “LEIN information may not be given to a private person for any purpose, and doing so is a criminal

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(...continued)

(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case. [MCR 6.201(B).]

<sup>21</sup> *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). quoting *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).

<sup>22</sup> MCR 6.201(C)(1).

<sup>23</sup> *Elkhoja I*, *supra* at 438-439.

<sup>24</sup> MCL 28.211 *et seq.*

<sup>25</sup> 1981 AACCS, R 28.5208(1), (4).

<sup>26</sup> 1981 AACCS, R 28.5209(2).

<sup>27</sup> 1981 AACCS, R 28.5210.

<sup>28</sup> *People v Mack*, 218 Mich App 359; 554 NW2d 324 (1996), nullified 455 Mich 865 (1997).

<sup>29</sup> *Elkhoja I*, *supra* at 438; *Mack*, *supra* at 362-363.

<sup>30</sup> *Elkhoja I*, *supra* at 452.

offense under MCL 28.214.”<sup>31</sup> As no rule or law authorizes the dissemination of LEIN information to criminal defendants seeking impeachment evidence, the dissent found that it would be illegal for a user agency to release the information to the prosecution for this purpose.<sup>32</sup>

After granting leave to appeal in *Elkhoja* to determine whether the trial court’s discovery order violated the LEIN statute and whether denying the defendant’s request would violate his constitutional rights, our Supreme Court reconsidered and vacated this Court’s opinion.<sup>33</sup> In doing so, the Supreme Court adopted the reasoning of the *Elkhoja* dissent.<sup>34</sup>

We are bound by the ruling of our Supreme Court, and therefore, find that the prosecutor was not required to produce records of the criminal histories of her civilian witnesses. We note, however, that in vacating this Court’s opinion in *Elkhoja*, the Supreme Court seriously altered long established law without considering the issue on leave granted. Criminal defendants still have the right to impeach witnesses with relevant evidence from their criminal histories, but are now left without the ability to access such information. As such, a defendant’s power to impeach the prosecution’s witnesses pursuant to MRE 609(a) has been rendered virtually useless.

Affirmed.

/s/ Kathleen Jansen  
/s/ Jessica R. Cooper

I concur in result only.

/s/ William B. Murphy

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<sup>31</sup> *Id.* at 451.

<sup>32</sup> *Id.* at 451-452.

<sup>33</sup> *People v Elkhoja*, 467 Mich 916; 655 NW2d 559 (2002), 658 NW2d 153 (2003).

<sup>34</sup> *Id.*